UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the matter of **Evanston Northwestern Healthcare Corporation,** a corporation, and **ENH Medical Group, Inc.,** a corporation.	)	Docket No. 9315 **(Public Record Version)**

MOTION FOR LEAVE TO TAKE DISCOVERY AFTER DISCOVERY

[illegible]

must assess the total cost of production" when considering whether to compel discovery from backup tapes. As of the date of the Motion to Compel, however, Complaint Counsel had decided

[redacted]

not to take formal discovery on this issue. Instead, Complaint Counsel cited to Respondents'

[redacted]

[redacted]

ARGUMENT

Under Rule 3.21(c)(2), this Court "may grant a motion to extend any deadline [including, but not limited to, the close of fact discovery on September 13, 2004] or time specified in th[e] scheduling order upon a showing of good cause." (Emphasis added.) The

first "additional provision" of the Scheduling Order in this case echoes this "good cause" requirement.

In Chicago Bridge & Iron Co., 2002 FTC LEXIS 60 (Dkt. 9300, Oct. 23, 2002)

Id. at *8-*9 (emphasis added); *see also id.* at *7-*8 ("Simply claiming that the importance of

[redacted]

standard since diligence is required in pursuing discovery.").

Complaint Counsel's request here to take depositions after the close of fact discovery should be similarly denied for two reasons. First, Complaint Counsel showed no

[redacted]

To the extent Complaint Counsel desired additional information concerning

[redacted]

one month before the close of discovery [redacted] to notice depositions of: (1) Respondents in their

serious stretch. There is more than enough information for this Court to deny both the Motion to Compel and the Motion for Leave based solely on the papers.

[redacted]

A. The Stated Reasons For Complaint Counsel's Belated Discovery Are Unpersuasive.

Complaint Counsel offers several unpersuasive reasons to support its request to take out-of-time deposition discovery on information technology issues. As an initial matter, Complaint Counsel continues to mistakenly assert that no discovery is unduly burdensome in complex antitrust litigation (even if fact discovery has closed), and the burden of paying for the expensive restoration of backup data should rest entirely with Respondents. This position conflicts with Rule 3.31(c)(1) as well as the case chiefly relied on by Complaint Counsel, *Zubulake v. UBS Warburg, LLC*, 217 F.R.D. 309, 320 (S.D.N.Y. 2003), which noted that *all* prior reported decisions addressing the discovery of backup tapes "have rendered the cost of

[redacted]

[REDACTED]

As a result, '[t]he data on a backup tape are not organized for retrieval of individual documents or files [because] . . . the organization of the data mirrors the computer's structure, not the human records management structure.' Backup tapes also typically employ

[redacted]

[REDACTED]

[REDACTED]

B. <u>The Motion for Leave Should Be Denied Because This Court May Deny The Motion To Compel Without Relying On The Declarations At Issue.</u>

As demonstrated below, there is no need or "good cause" to depose

witness depositions concerning such information. To play out Complaint Counsel's request, fact discovery would have to be reopened and extended for a few months to allow the parties to absorb the incredible volume of electronic data at issue. This, in turn, likely would require expert discovery (to date, ten experts have been identified by the parties) to begin in early 2005. The hearing might then have to be postponed until well into the middle of next year. There is no legal or logical basis for such a result. *Cf.* Rules Report, Proposed Amendment to Fed. R. Civ. P.

[redacted]

party identifies as not reasonably accessible" unless court orders such discovery for "good

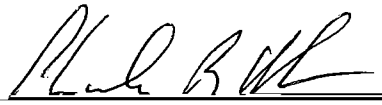
[redacted]

CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Court deny Complaint Counsel's Motion for Leave to Take Discovery After Discovery Cut-Off Date and Stay Consideration of Motion to Compel.

September 21, 2004

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on September 22, 2004, a copy of the foregoing ***Respondents' Opposition to Complaint Counsel's Motion for Leave to Take Discovery After Discovery Cut-***

[redacted]

postage prepaid, on:

The Honorable Stephen J. McGuire
Chief Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave. NW (H-106)
Washington, DC 20580
(two courtesy copies delivered by messenger only)

Thomas H. Brock, Esq.
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UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the matter of	)	
Evanston Northwestern Healthcare Corporation, a corporation, and	)	Docket No. 9315
ENH Medical Group, Inc., a corporation.	)	

ORDER

Upon consideration of Complaint Counsel's Motion for Leave to Take Discovery After Discovery Cut-Off Date and Stay Consideration of Motion to Compel ("Motion") and Respondents' opposition thereto, and the Court being fully informed, it is this _____ day of _____, 2004 hereby

ORDERED, that the Motion is DENIED.

The Honorable Stephen J. McGuire

CHIEF ADMINISTRATIVE LAW JUDGE

FOCUS - 2 of 7 DOCUMENTS

In the Matter of CHICAGO BRIDGE & IRON COMPANY N.V., a foreign corporation

CHICAGO BRIDGE & IRON COMPANY, a corporation, and PITT-DES MOINES, INC., a corporation

DOCKET NO. 9300

2002 FTC LEXIS 69

ORDER ON RESPONDENTS' MOTION TO STRIKE WITNESSES

October 23, 2002

[*1]

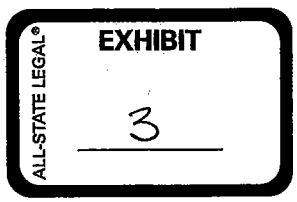
Pursuant [*3] to the Third Revised Scheduling Order, entered on September 10, 2002, Complaint Counsel

by two additional months, to September 6, 2002. The [*71] Third Revised Scheduling Order, entered on September 10

The parties, in moving for the first revision of the scheduling order, requested an extension for the close of discovery, but did not seek extensions of time for providing preliminary and revised witness lists. Complaint Counsel, in opposing Respondents' motion for the second revision, did not argue that discovery should not be extended because Complaint Counsel had already served its revised witness list. Thus, although the close of discovery was extended, the

REDACTED

REDACTED



COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

To: **Honorable David F. Levi, Chair, Standing Committee on Rules of Practice and Procedure**

From: **Lee H. Rosenthal, Chair, Advisory Committee on Federal Rules of Civil Procedure**

Date: **May 17, 2004, Revised, August 3, 2004**

Re: **Report of the Civil Rules Advisory Committee**

Introduction

The Civil Rules Advisory Committee met at a conference on electronic discovery at Fordham Law

II Action Items: Rules Recommended for Publication

A. PROPOSED AMENDMENTS INVOLVING ELECTRONIC DISCOVERY

Introduction

The Civil Rules Committee recommends that the Standing Committee publish for comment a package of proposed rule amendments relating to the discovery of electronically stored information. Over the past five years, the Committee has examined whether the rules adequately

accommodate discovery of information generated by, stored in, retrieved from, and exchanged through, computers. During this period, electronic discovery has moved from an unusual activity encountered in large cases to a frequently seen activity used in an [illegible]

The sheer volume of such data, when compared with conventional paper documentation, can be staggering. A floppy disk, with

The uncertainties and problems lawyers, litigants, and judges face in handling electronic discovery under the present federal discovery rules are reflected in the growing demand for additional rules in this area. At least four United States district courts have adopted local rules to address electronic discovery, and many more are under consideration. Two states have, and more are considering, court rules specifically addressing these issues. There is much to be said for these local rules and much has been learned from experience under them. But if there is delay in considering whether to change the federal rules, the timetable of the rulemaking process will inevitably result in a proliferation of local rules. Adoption of

practices and frustrate the ability to achieve the national standard the Civil Rules were intended to provide in the areas they address. As electronic discovery becomes more and more common, the burdens and costs of

1.Background and Synopsis

To gather information from diverse segments of the bar and to hear from judges, the Committee held two mini-conferences in 2000—one in San Francisco and the other in Brooklyn—and a major conference in

drawn on the accumulation of experience reflected in case law, in the expanded treatment in the fourth edition of the *Manual for Complex Litigation*, and in "best practices" protocols drafted by the ABA Litigation Section and other organized bar groups. This work has led the

discovery of electronically stored information, there is no need to discuss these issues. When such discovery is anticipated, the rule amendments focus the parties and the court on early identification and resolution of

or a significant part of that activity could paralyze a party's operations. An overbroad approach to preservation may be prohibitively expensive and unduly burdensome for parties dependent on computer systems for their operations. In Rule 26(f), the parties are directed to discuss preservation

of discoverable information during their conference to develop the discovery plan. Although this provision applies to all discoverable information, it is particularly important with regard to electronically stored information. The Note emphasizes that the parties should be specific, balancing preservation needs with the need to continue ordinary operations of computer systems. Rule 16(b)(5) states that the scheduling order should include provisions relating to discovery of electronic

without a complete prior privilege review and an agreement that production of privileged documents will not waive the privilege.

[redacted]

A responding party's screening of vast quantities of unorganized computer data for privilege prior to production can be particularly

[redacted]

information, they are particularly important with regard to electronically stored information.

The proposed amendment of Rule 26(f)(4) is limited to the parties' discussion of whether to include in the discovery plan an agreement that the court should enter an order protecting the right to

is particularly interested in receiving comment on whether this amendment should be less restrictive, similar to proposed Rule 26(f)(3). A less restrictive rule would direct the parties to discuss and include in the discovery plan any issues relating to the protection of privileged information in discovery. The third area of focus is the form of production.

PROPOSED AMENDMENTS TO THE

[redacted]

Rule 16. Pretrial Conferences; Scheduling; Management

* * * * *

(b) Scheduling and Planning. Except in categories of actions [redacted] exempted by district court rule as inappropriate, the district judge, or a magistrate judge when authorized by district court rule, shall, after receiving the report from the parties under Rule 26(f) or after [redacted]

30 * * * * *

Committee Note

The amendment to Rule 16(b) is designed to alert the court to the possible need to address the handling of discovery of electronically stored information early in the litigation if such discovery is expected to occur. Rule 26(f) is amended to direct the parties to discuss discovery of

avoiding delay and excessive cost in discovery. *See Manual for Complex Litigation* (4th) § 11.446. Rule 16(b)(6) recognizes the propriety of including such [illegible]

[redacted]

order. Court adoption of the chosen procedure by order advances

[redacted]

enforcement of the agreement between the parties and adds protection against nonparty assertions that privilege has been waived. The rule does not provide the court with authority to enter such a case-management order without party agreement, or limit the court's authority to act on

[redacted]

motion.

local rule, the court may also limit the number of requests under Rule 36. The frequency or extent of use of the discovery methods otherwise permitted under these rules

and by any local rule shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into

[redacted]

not reasonably accessible. On motion by the requesting party, the responding party must show that the information is not reasonably accessible. If that showing is made, the

things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

(B) ***Privileged information produced.*** When a party produces information without intending to waive a claim of privilege it may, within a reasonable time, notify any party that received the information of its claim of privilege. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies. The producing party must comply with Rule 26(b)(5)(A) with regard to the information and preserve it pending a ruling by the court.

* * * * *

(f) Conference of Parties; Planning for Discovery. Except in categories of proceedings exempted from initial disclosure under Rule 26(a)(1)(E) or when otherwise ordered, the parties must, as soon as practicable and in any event at least 21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b), confer to consider the nature and basis of

their claims and defenses and the possibilities for

(2) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused upon particular issues;

(3) any issues relating to disclosure or discovery of electronically stored information, including the form in which it should be produced;

(4) whether, on agreement of the parties, the court should enter an order protecting the right to assert privilege after production of privileged information;

(53) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

(64) any other orders that should be entered by the court under Rule 26(c) or under Rule 16(b) and (c).

The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan. A court may order that the parties or attorneys attend the conference in person. If necessary to comply with its expedited schedule for Rule 16(b) conferences, a court may by local rule (i) require that the conference between the parties occur fewer than 21 days before the scheduling conference is held or a scheduling order is due under Rule 16(b), and (ii) require that the written report outlining the discovery plan be filed fewer than 14 days after the conference between the parties, or excuse the parties from submitting a written report and permit them to report orally on

[redacted]

* * * * *

Committee Note

Subdivision (b)(2). The amendment to Rule 26(b)(2) is designed to address some of the distinctive features of electronically stored information, including the volume of that information, the variety of locations in which it might be found, and the difficulty of locating, retrieving, and producing certain electronically stored information. Many

accessible, the court may nevertheless order discovery for good cause, subject to the provisions of Rule 26(b)(2)(i), (ii), and (iii).

The *Manual for Complex Litigation* (4th) § 11.446 illustrates the problems of volume that can arise with electronically stored information:

> The sheer volume of such data, when compared with conventional paper documentation, can be staggering. A floppy disk, with 1.44 megabytes, is the equivalent of 720 typewritten pages of plain text. A CD-ROM, with 650 megabytes, can hold up to 325,000

example, changing the systems necessary to retrieve and produce the information.

The amendment to Rule 26(b)(2) excuses a party responding to a discovery request from providing electronically stored information on the ground that it is not reasonably accessible. The responding party must

identify the information it is neither reviewing nor producing on this ground. The specificity the responding party must use in identifying such electronically stored information will vary with the circumstances of the case. For example, the responding party may describe a certain type of information, such as information stored solely for disaster recovery purposes. In other cases the difficulty of accessing the information as

The rule recognizes that, as with any discovery, the court may impose appropriate terms and conditions. Examples include sampling electronically stored information to gauge the likelihood that relevant information will be obtained, the importance of that information, and the burdens and costs of production; limits on the amount of information to be produced; and provisions regarding the cost of production.

When the responding party demonstrates that the information is not reasonably accessible, the court may nevertheless order discovery if the requesting party shows good cause. The good-cause analysis would

the responding party. Courts addressing such concerns have properly

The rule does not prescribe a particular method of notice. As with the question whether notice has been given in a reasonable time, the

many cases informal but very rapid and effective means of asserting a privilege claim as to produced information, followed by more formal notice, would be reasonable. Whatever the method, the notice should be as specific as possible about the information claimed to be privileged, and about the producing party's desire that the information be promptly returned, sequestered, or destroyed.

Subdivision (f). Early attention to managing discovery of

[redacted]

may be prohibitively expensive and unduly burdensome for parties dependent on computer systems for their day-to-day operations.") Rule 37(f) addresses these issues by limiting sanctions for loss of electronically stored information due to the routine operation of a party's electronic information system. The parties' discussion should aim toward specific provisions, balancing the need to preserve relevant evidence with the need to continue routine activities critical to ongoing business. Wholesale or broad suspension of the ordinary operation of computer disaster-recovery systems, in particular, is rarely warranted. Failure to attend to these issues early in the litigation increases uncertainty and raises a risk of later

These problems can become more acute when discovery of electronically stored information is sought. The volume of such data, and

electronically stored information, may make privilege determinations more difficult, and privilege review correspondingly more expensive and time

consequences of inadvertent waiver by allowing them to "take back"
inadvertently produced privileged materials if discovered within a

reasonable period, perhaps thirty days from production.

Manual for Complex Litigation (4th) § 11.446.